UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SEVEN JOHN DOES, Appellants, v. OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	Docket Nos. DA08318110337 and DC08318110596

SIX APPELLANTS' CLOSING BRIEF

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I. STATEMENT OF THE CASE

A. Introduction

This is a case of first impression. It presents the question whether, in the unique circumstances of this case, Central Intelligence Agency (CIA) service (to which a special early retirement system applies) will be credited in the same way as law enforcement officer service (to which a similar special early retirement system applies) for retirement purposes when the number of years in both services, if served only in one, would unquestionably entitle the officer to the special retirement system. Here a small group of CIA officers transferred to the Drug Enforcement Administration (DEA) (formerly called Bureau of Narcotics and Dangerous Drugs [BNDD]) to become law enforcement officers when the government's narcotics intelligence function was transferred from CIA to DEA. They did so with the encouragement of both DEA and CIA. DEA and CIA officials expressly promised them, as an inducement to transfer, that they would receive law enforcement officer retirement benefits for their unique and hazardous service as CIA officers. The Office of Personnel Management (OPM) denied these benefits to the former CIA officers and this appeal followed.

Appellant A put the essence of the case when he appeared on the witness stand:

> For my 20 years of Government service I have always been in a special retirement program in a small group or population within the larger population. At CIA the special retirement I was in was not for everybody in CIA. In DEA the special retirement is not for everybody in DEA. I have never been out of this type of special retirement system. I have met all the requirements of the CIA system for retirement except the age. I have met all of the requirements of the DEA system, as far as I know, except for the age. I have paid into both systems, at the special rate in the DEA system. I'm still paying at a higher deduction from my salary for retirement that I've been

> told I can't have. I don't understand why I shouldn't have the retirement that I have paid for and earned -- not paid for just in money, but paid for in a lot of personal ways: long hours, family strain, very difficult things to put a price on.

(Tr. III 39).

During a five day evidentiary hearing appellants proved by a preponderance of the evidence that the CIA service they performed meets the definition of law enforcement officer duties set forth in statute and regulation, as normally interpreted by OPM and the predecessor Civil Service Commission (CSC) (part II, infra); that high agency officials, acting within their authority, promised appellants law enforcement officer credit for their prior CIA service, and that appellants reasonably relied on the promises made to their detriment (part III, infra). Appellants are therefore entitled to relief under applicable statute and regulations and under the equitable doctrine of promissory estoppel.

Moreover, the public interest strongly favors the retirement credit appellants seek here. They have earned the promised benefits by their uncommon federal service and have paid for it by higher retirement contributions. There is no countervailing harm to the government; a ruling for appellants will apply essentially only to them and will have limited application, posing no threat to the civil service retirement fund (part IV, infra).

B. The CSC and OPM Decisions

1. The Initial Denial

Intending in good faith to make good on its representations to appellants, DEA sought, promptly after their transfer, to have CSC confirm their retirement status under 5 U.S.C. § 8336(c). DEA Personnel Director Aaron P. Hatcher, III, was notified on June 4, 1975, and on May 11, 1977, respectively, that CSC had denied the applications for appellants Murray and Baldwin. (Exhibits 8 and 11 to appellants' Memorandum to Director of OPM dated November 25, 1980). The denial letters were almost identical. They said that Messrs. Murray and Baldwin did not meet the

definition of law enforcement officer set forth in 5 U.S.C. § 8331(20) (1974), on the basis that, according to CIA, "...that agency [CIA] is not authorized by law, and indeed does not engage in activities that involve primarily the investigation, apprehension and detention of persons suspected or convicted of offenses against the criminal laws of the United States." (Id. -- see last ¶¶ of both Exhibits). The matter of appellants' 8336(c) request had come to a head in 1976, when DEA Administrator Peter B. Bensinger requested the assistance of Assistant Attorney General Glen E. Pommerening in resolving appellants' retirement problem and Mr. Pommerening reported that since appellants' CIA service was not in a "law enforcement position," it would not qualify "as law enforcement service." (Tr. IV 52-3; Exhibit 7 to appellants' Memorandum to Director of OPM dated November 25, 1980).

The CSC accepted as conclusive CIA's assertion (based on statutory formality) that CIA and its officers are not engaged in law enforcement activities. CSC gave no consideration at all to appellants' hazardous service at CIA and gave no weight to DEA's repeated requests for 8336(c) credit on appellants' behalf. (See Exhibits 7, 8 and 11 to appellants' Memorandum to the Director of OPM dated November 25, 1980). It ignored both appellants' pre-transfer eligibility for the benefits of the CIA's 50/20 "CIARDS" retirement system based on "hazardous service," and the then-effective § 8336(c) system also based on "hazard." (See p.8, infra). CSC was unfamiliar with the "hazard" concept; it had previously been the employing agency's function to determine retirement questions based on hazardous duty, but that function was turned over to CSC in the July 12, 1974, amendments to § 8336(c). (Compare 5 U.S.C. §§ 8331(20) and 8336(c) with former § 8336(c), quoted at n. 5 infra; see Hatcher testimony, Tr. IV 50-56; Tinsley testimony, Tr. V 42). Hatcher concluded that the new (post-July 12, 1974) CSC administrators "did not have the historical perspective as it pertains to DEA." (Tr. IV 56). They would no longer consider hazard but would take a formalistic approach to "the primary duties of the position." (Tinsley testimony, Tr. V 42). CSC simply had failed to examine the material

facts -- the actual functions and duties appellants performed at CIA and the actual hazards they experienced. (See Tinsley testimony Tr. V 43, 64; Ruddoch testimony Tr. IV 187).

2. The Second Denial

On January 25, 1980, the six appellants for whom this brief is filed submitted their own request to OPM to credit their CIA service in the 8336(c) program.[1/] (Exhibit 1 to appellants' Memorandum to Director of OPM dated November 25, 1980). Appellant Baldwin joined the request on February 11, 1980. (Exhibit 2 to appellants' Mem. to Director of OPM). On February 4 and May 22, 1980, OPM's Craig B. Pettibone sent letters to CIA requesting information on whether appellants were primarily engaged in the investigation, apprehension, or detention of persons suspected or convicted of violating U.S. criminal laws. CIA's response was predictably in the negative, as OPM must have anticipated.[2/] (Copies of Mr. Pettibone's two letters appear in OPM's administrative record, which record OPM's counsel represented "indicates what the decision making process was," Tr. V 139.) Pettibone's February 4, 1980 letter ruled out relief based on the broken retirement promises and the promissory estoppel doctrine. (Id.) On November 25, 1980, appellants submitted a 26-page memorandum, with 18 exhibits, to the Director of the Office of Personnel Management, setting forth essentially the same factual and legal arguments presented here. CIA responded to OPM's information request on December 29, 1980, in a

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1/ OPM General Counsel Margery Waxman had promised undersigned counsel in a meeting on November 5, 1979, that OPM would take a new look at appellants' retirement request and would not rule out relief on res judicata or collateral estoppel grounds for the one appellant (Murray) whose request CSC had denied earlier.

2/ OPM's Kenneth Glass testified that "...the history of the agency [CIA] has been to report to CSC and OPM that they didn't have a law enforcement function." (Tr. V 160).

letter which was admittedly incomplete (last ¶, page 6).[3/]

There is nothing in the record to show that OPM staff either examined appellants' "unclassified folders like the military 201 files," which DEA official Lucien Conein examined when he recruited the appellants (Tr. III 89), or their CIA position descriptions, which appellant Davis stated were almost identical to their DEA job descriptions (Tr. II 87). OPM thus did not follow its normal practice, to review a retirement claimant's position description. (Tinsley testimony Tr. V 44). No in camera hearing took place at OPM, even though OPM's General Counsel had considered holding one to determine if appellants' CIA functions would qualify for 8336(c) credit. (Tr. V 144-5). OPM staff did not contact the appellants while their request was pending to ascertain what functions and duties they performed at CIA; as appellants testified, the first time OPM or CSC ever questioned them was at the hearing in cross-examination. (See Simon Tr. I 24; Chavez Tr. II 26-7, 43; Davis Tr. II 86-7; Murray Tr. II 160; Appellant A Tr. III 38). Nonetheless, without OPM bothering to obtain the relevant facts about the hazards and law enforcement activities that had characterized appellants' CIA careers, on February 26, 1981, OPM formally denied appellants' request. On March 18, 1981, appellants filed this appeal to the Merit Systems Protection Board. OPM opposed the appeal.

Appellants and OPM served documentary and interrogatory discovery on each other. Working with CIA, whose interest in the case (which is appellants' interest as well) is to prevent disclosure of classified information, particularly disclosure that could endanger them, appellants filed statements setting forth the nature of their CIA work.

A five-day evidentiary hearing was held before the Administrative Law Judge (Judge) beginning December 15, 1981.

3/ A sanitized copy of CIA Associate General Counsel Edmund Cohen's letter to Craig B. Pettibone, OPM, dated December 28, 1981, was placed in the record by CIA after the hearing. It is curious that at the hearing OPM offered no testimony on the accuracy of CIA's letter or on how complete or accurate records of CIA operations are; and it should be remembered that much of what takes place at CIA is not put in writing. (See Simon Tr. I 67, 66; Baldwin Tr. I 118; Murray Tr. II 121).

Six of the appellants testified, as did former CIA Director Colby, former DEA recruiting officials Lucien Conein and John Warner and witnesses from OPM/CSC, DEA and CIA. The Judge ordered the submission of post-hearing briefs by February 22, 1982.

II. APPELLANTS' SERVICE AT CIA WAS SERVICE AS LAW ENFORCEMENT OFFICERS FOR RETIREMENT PURPOSES

The special law enforcement officer retirement program established pursuant to 5 U.S.C. §§ 8336(c) provides that the officer may retire at the age of 50 after completing 20 years of law enforcement officer work.[4/] "Law enforcement officer" is defined for retirement purposes in 5 U.S.C. § 8331(20)(1974) as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States ..." and "an employee engaged in this activity who is transferred to a supervisory or administrative position." Before amendment on July 12, 1974, the statutory scheme included an additional consideration pertinent to retirement: that the law enforcement officer's duties should have involved a "degree of hazard" as determined by the agency head and the CSC.[5/]

All seven appellants had been working at CIA and had effected their transfer to DEA before July 12, 1974. (Simon Tr. I 24, Baldwin Tr. I 121-2; Chavez Tr. I 174, 183; Davis Tr. II 77; Murray Tr. II 110-11; Appellant A Tr. III 21-3; Dyckman Service Statement, p. 1).

4/ Since July 12, 1974, the law enforcement officer has had a higher percentage (7-1/2) of his basic pay withheld and deposited in the retirement fund, and he receives a higher annuity. 5 U.S.C. § 8334 (1974).

5/ The former § 8336(c) provided as follows:

> An employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States or are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position, who is separated from the service after becoming 50 years of age and completing 20 years of service in the performance of these duties is entitled to an annuity if the head of his agency recommends his retirement and the Civil Service Commission approves that recommendation. The head of the agency and the Commission shall consider fully the degree of hazard to which the employee is subjected in the performance of his duties, instead of the general duties of the class of the position held by the employee....

Sen. Rep. No. 93-948, 93d Cong., 2d Sess. 14 (1974).

At the time of their transfer all were in the CIA's similar 50/20 retirement system ("CIARDS") or were eligible for and were in the process of joining it. (Appellants' Ex. No. 7). One significant purpose of the special 20/50 CIARDS retirement, as Andrew E. Ruddoch testified, is to recognize and reward hazardous service. (Tr. IV 178).

Appellants are entitled to the early retirement benefits they seek under both the pre-1974 and post-1974 statutory scheme. Their service at CIA was "law enforcement" within the meaning of the statute both before and after the 1974 amendments (A, infra), and it was hazardous within the meaning of the statute as it existed at the time of their transfer (B, infra).

A. Appellants' CIA Work Was Law Enforcement Officer Work Within The Meaning Of The Statute

OPM justifies its denial of credit for appellants' CIA service as § 8336(c) 50/20 retirement service by contending that their CIA duties were not "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States," and thus do not meet the definition of "law enforcement" in 5 U.S.C. § 8331(20). This contention rests essentially on three grounds:

> (1) That the CIA is prohibited by federal law from "exercising any policy, subpoena, or law enforcement powers and from performing any internal security functions." (Denial letter from Acting OPM Director Arch S. Ramsay to appellants' counsel Joseph D. Gebhardt dated February 26, 1981, p. 1).[6/]
>
> (2) That appellants held intelligence positions, not law enforcement positions at CIA and therefore did not have "law enforcement officer" duties. (Id.)

6/ OPM continued to rely on this ground at the hearing. See OPM counsel's written opening argument: "...CIA, by its charter, is prohibited from carrying out law enforcement activities. 20 U.S.C. 430. Thus, CIA could never have authorized or directed the Appellants to act as law enforcement officers as required by Sections 8336(c) and 8331(20)." (Tr. V 8). [The proper citation to the relevant section of the CIA charter is 50 U.S.C. § 403(d)(3) (1947).]

(3) That appellants did not make arrests at CIA and they therefore did not engage in the "apprehension" and "detention" of suspected or convicted criminals. (Tr. I 88; I 165-6; II 38; II 96; II 148; III 49-50).

At the hearing, however, OPM's three witnesses each admitted that the actual functions and duties appellants performed when they were CIA officers (not statutory formalities or labels) are the determining factor in deciding whether they should be granted § 8336(c) credit for their CIA service. (Tr. IV 187, 192-3; V 67; V 159). This of course merely restates the law. See Ellis v. United States, 610 F.2d 760, 764-65 (Ct.Cl. 1979).

Within the tight bounds of the Secrecy Agreements they executed as CIA officers and had to honor throughout this proceeding, appellants described how closely their CIA work, functions and duties resembled their work, functions and duties at DEA. Appellants' testimony was supported in substantial part by DEA and CIA witnesses and not refuted in any way by OPM at the hearing.

In summary (as we set forth in detail below) the record is clear that during appellants' tenure at CIA, CIA had specific investigative and police liaison functions overseas. These functions directly supported U.S. law enforcement, inter alia, through identification of individuals suspected of violating U.S. criminal laws or of committing crimes against American citizens in foreign countries. Appellants performed these investigative and police liaison duties for a substantial portion of their careers with CIA. In short, appellants' positions and their work at CIA[7/] meet the definition of law enforcement duties of 5 U.S.C. § 8331(20), as "primarily the investigation ... of individuals suspected ... of offenses against the criminal laws of the United States."

7/ Appellants were unique at CIA -- part of a highly select group of intelligence and operations officers trained in covert intelligence collection, counterintelligence, weapons use and paramilitary activities.

1. Appellants' Duties

Appellant A

Appellant A testified that a substantial portion of his career as a CIA officer was devoted to supporting criminal law enforcement:

> In various assignments with the Agency [CIA] I was called upon to report information which led to indictments, and eventually convictions in the U.S. Courts system, these circumstances included information and reporting on illegal aliens, general smuggling, narcotics trafficking, violations of the Neutrality Law, gun running, importing and exporting firearms and explosives, passport fraud, terrorism against U.S. officials ....

(Tr. III 8). While A and the other appellants were at CIA there was no Chinese wall between criminal law enforcement per se and CIA's law enforcement support work. Appellant A "frequently worked in conjunction with, and part of teams with other government agencies, doing essentially law enforcement work, supporting the law enforcement -- prosecution of the criminal laws of the United States." (Id.) He described in detail a year-long joint narcotics intelligence project he did with a DEA law enforcement officer in a foreign country. (Tr. III 9-12). He and the DEA agent worked together as colleagues doing exactly the same thing every day. Like the DEA agent, Appellant A's "major duty was to investigate narcotics violations of the United States, and to identify traffickers and their means and methods of smuggling their sources of supply, where they got their money, where they kept it and who they gave it to." (Tr. III 9). The purpose of their joint intelligence collection operation was to enable U.S. and local authorities to make arrests of the drug violators they identified. (Tr. III 10). Appellant A's work on this (his last) CIA assignment led to his recruitment by DEA, which wished to emply his services as a DEA special agent doing narcotics intelligence investigations. (Tr. III 12).

Robert A. Simon

Appellant Simon collected and transmitted narcotics intelligence on two CIA assignments. He testified that "there is absolutely no difference" in function between a CIA narcotics intelligence officer and a DEA special agent operating overseas. (Tr. I 30, 90). He testified that a goal of certain of his CIA intelligence assignments was to "make" criminal cases and obtain indictments, and he specifically mentioned doing investigations of terrorism while at CIA. (Tr. I 36, 86, 62).

Elias P. Chavez

Appellant Chavez testified that his assignments at CIA included narcotics intelligence and drug eradication work, the purpose of which was to interdict illegal drugs from reaching U.S. citizens, as well as work to prevent and control terrorism. (Tr. I 178; II 5, 14, 38). His wife, Arlene, observed him engaged in narcotics intelligence work in a foreign country. (Tr. II 53). Chavez testified that the duties and functions of CIA and DEA narcotics intelligence officers are the same. (Tr. II 46).

Terry T. Baldwin and Louis J. Davis

Appellant Baldwin testified that during 1971-74 he did the same narcotics intelligence job first for CIA and then, after his transfer, for BNDD/DEA, in the same foreign country. Indeed, both before and after his transfer he worked with the same CIA officers and informants. (Tr. I 108, 111, 122-24). In response to OPM's challenge on cross-examination, the gist of Baldwin's answer was that although he was not called a law enforcement officer at CIA, he nevertheless primarily enforced the criminal laws of the United States when he served as a CIA officer. (Tr. I 165, 169). Indeed, in Baldwin's judgment the CIA had a better narcotics intelligence program in the country in which he worked than did BNDD/DEA. (Tr. I 122).

Appellant Davis testified that in his experience, intelligence collection operations and law enforcement operations can-

not be separated -- "they merge together as one unit." (Tr. II 68). Law enforcement would be "blind" without the collection of intelligence. (Id.) CIA and DEA used similar investigative techniques, including the spotting, recruiting and developing of informants and the conducting of surveillances. These techniques are "the backbone of both Agencies." (Tr. II 60).

While at CIA Davis performed narcotics intelligence work in foreign countries, and narcotics intelligence he collected for CIA was transmitted to BNDD/DEA. Moreover, some of the intelligence he has collected for DEA in recent years has been transmitted to CIA. (Tr. II 61). Davis testified that the collection and reporting of narcotics intelligence was a CIA "requirement" beginning in 1969 or 1970, at which time drugs and narcotics became a significant CIA "target." (Tr. II 100, 95). On one occasion while serving with CIA, Mr. Davis assisted in making an arrest and interrogating the narcotics trafficking suspect. (Tr. II 105).

The Davis and Baldwin testimony made clear the significant task -- a paradigm law enforcement task -- they performed as CIA narcotics intelligence officers: preventing the flow of heroin and other narcotic drugs aimed at U.S. servicemen fighting in the War in Southeast Asia. (Tr. II 67-8; I 120).

Hugh E. Murray

Appellant Murray's testimony focused on his extensive background in CIA's foreign police liaison work. He worked in five different foreign countries, training their police and conducting joint operations with them. (Tr. II 113-4). Not only did this police liaison work establish the basis for reciprocal law enforcement efforts by creating the necessary good will for the United States, it helped prevent acts of terrorism against U.S. officials and citizens by both foreign individuals and Americans and aided in preventing violations of our country's laws against terrorism. (Tr. II 114-5, 158-9).

Murray also testified to the close relationship between the work of CIA and of DEA in narcotics prevention and terrorism control. The two agencies systematically share information (which DEA's John Warner also pointed out, Tr. III 66-7); in reality CIA's work in these two areas is a law enforcement function. (Tr. II 159). Murray testified that CIA's enforcement of the espionage laws in actually "preventive maintenance" in the practical enforcement of U.S. criminal laws. (Tr. II 146).

2. Similarities of Appellants' Duties at the Two Agencies

Appellants testified that their functions and duties were essentially the same at both CIA and DEA. Each stated that his duties at both agencies were similar and that there were no significant changes after transfer to DEA. Each stated that his primary function at both agencies was and is the conduct of investigations.[8/] Appellants' main duties have been undercover intelligence collection, use of informants, surveillances, interrogations and oral and written reporting on these investigations. (See appellants' written statements of their service at DEA and CIA, and Tr. Vols. I; II; III at 4-59 passim). Appellant Murray, for example, pointed out that the investigative and intelligence techniques employed by CIA and DEA are "an exact duplicate." (Tr. II 129). According to appellant Davis, his CIA and DEA job descriptions were "almost identical." (Tr. II 87). Appellants used similar investigative and photographic devices at both agencies. (See Tr. II 61). Appellant Chavez's first DEA assignment was a covert penetration of narcotics organizations in a foreign country. Appellant Murray's first job with DEA was arranging the reassignment of CIA's foreign narcotics informants to DEA. Appellant A was asked to train other DEA special agents when he joined DEA. (Tr. I 108, 111, 122-4; II 10, 12, 47; II 127; III 26). Finally, appellants Simon, Chavez and Murray all testified to how their CIA training prepared them to use DEA's most important narcotics prevention

8/ The original 50/20 retirement program for law enforcement officers was enacted by Congress to permit early retirement for agents of the federal government's lead "investigations" agency, the Federal Bureau of Investigation. (Tr. IV 132).

tool, the "making" of conspiracy cases by recruiting informants and making arrests of the "small fry," forcing them to identify the "bigger fish" -- the producers, importers and wholesale drug dealers. (Tr. I 59-60; II 17; II 132-3). Indeed, for appellants DEA training was only a formality. When appellants Baldwin and Chavez joined DEA, they were initially excused from Basic Agent Training and instead given their first assignments; appellant A testified that the CIA transferees underwent DEA training after being told that training was necessary to win acceptance in the DEA organization. (Tr. I 121-2; II 10; III 24).

At DEA appellants continue to work in inter-agency police operations with foreign, state and local police and federal law enforcement officers. This was work they had begun at CIA. For example, appellant Simon was the coordinator of the INIS[9/] task force in Miami and was involved in monitoring a foreign terrorist organization (Tr. I 59, 61, 87). Appellant Davis served as Watch Commander at DEA's El Paso Intelligence Center, then as a regional liaison and intelligence officer at DEA. He is now working in a joint investigation with other federal agencies. (Tr. II 81-3). Appellant Murray is presently in charge of an inter-agency Air Smuggling Group at DEA's Tucson District Office. (Tr. II 130-1). Appellant A has worked with the Attorney General of Mexico in effecting the prosecution of narcotics violators in that country. (Tr. III 27-8, 58). Appellant Dyckman is DEA's Maritime Coordinator for Northern California working with state, local and federal authorities in the interdiction of illegal drugs being smuggled by sea from Asia and South America into the Pacific Coast region. (Dyckman Statement, ¶ 6, p. 2).

3. The Reason for Appellants' Transfer from CIA to DEA

Former CIA Director Colby indicated at the hearing that appellants transferred to DEA because he, as Director, decided

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9/ INIS is the pseudonym given to the Interagency Narcotic Intelligence System.

(with the support of the President of the United States) to transfer the task of overseas narcotics intelligence from CIA to DEA. (Tr. III 109, 112). Colby therefore "encouraged" appellants to join DEA. The CIA actively cooperated with DEA in appellants' recruitment at CIA, which Director Colby admitted was a "rare" occurrence indeed. (Tr. III 109-112). Director Colby's testimony was confirmed at the hearing by John Warner, DEA's then Chief of International Intelligence (Tr. III 61), and by Lucien E. Conein, a DEA intelligence officer. (Tr. III 86-9). Warner testified that DEA hired the appellants as law enforcement officers to perform the job of collecting narcotics intelligence overseas and domestically. (Tr. III 73). Conein testified that DEA sought appellants for the unique role of DEA narcotics intelligence officers because of their experience as trained CIA intelligence officers and their training as DEA criminal investigators. (Tr. III 94-5).

* * *

As in Ellis v. United States for firefighters, 610 F.2d at 764, "the ordinary meaning of the term [law enforcement officer] as used in this statute is a person who combats [crime]." Here appellants, while at the CIA, were engaged in combatting crime: the deadly and pernicious traffic in narcotics that begins overseas and ends on the street corners and in the alleys of American cities. They have continued the same combat at DEA. They were as much law enforcement officers for retirement purposes while at CIA as they are now at DEA.

B. Appellants' CIA Service Met The Hazard Requirement Applicable To Law Enforcement Officers Prior To July 12, 1974

Appellants testified that their service was hazardous during all or almost all of their entire careers at CIA. Appellant Simon testified that his CIA assignments "often involved great danger, violence, and the whole spectrum of dangerous activity" (Tr. I 67), and that these hazards at CIA were greater than the hazards he encountered as a law enforcement officer working as

a "street agent" at DEA. (Tr. I 27):

> At DEA I regularly encounter armed criminals working either under cover, or in arrest and confrontation situations. At CIA ... there were many dangerous situations, including armed confrontation and nonarmed confrontation where I was in great physical danger. ... it was much more hazardous at CIA.

(Id.) The other six appellants testified that their work at CIA was hazardous, with most of them making the point that their CIA service involved greater hazards than their subsequent DEA service. (Baldwin-Tr. I 111; Chavez-Tr. I 175; Davis-Tr. II 61; Murray Service Statement, p. 3; Appellant A, Tr. III 7); Dyckman Service Statement, p. 3). Appellant Chavez's testimony revealed that he received the CIA's highest award for valor, the Intelligence Star for Valor, from Director of Central Intelligence William E. Colby personally on February 8, 1974. Chavez's award was for "outstanding services ... performed under grave personal risk" in a foreign country. (Tr. I 185, 187). He and his associates withstood "heavy enemy bombardment" and a "massive enemy attack." (Id.) Appellant Simon recalled an incident where he survived the bombardment of a house in which he was stationed in the CIA and stated that his entire 30-year career in federal service was spent in a hazardous, dangerous line of work. (Tr. I 27, 66).

All seven appellants testified that they carried firearms, which most of them had to use, on certain of their CIA assignments. (Simon-Tr. I 27; Baldwin Service Statement, p. 6; Chavez-Tr. I 175; Davis-Tr. II 61; Murray Service Statement, p. 3; Appellant A-Tr. III 31; Dyckman Service Statement, p. 3). They all testified that they used similar equipment at both CIA and DEA, with appellants Chavez and Simon specifically mentioning firearms as a type of similar equipment used at both agencies. (Simon-Tr. I 31-2; Baldwin-Tr. I 113; Chavez-Tr. I 176-7 "M-16 weapons. Shotguns too"; Davis-Tr. II 61; Murray Service Statement, p. 4; Appellant A, Tr. III 7; Dyckman Service Statement, p. 10). In addition to the external hazards confronting the appellants in their every-

day work as CIA officers, they have been required to work long and irregular hours, well beyond the normal 40 hours per week, during their entire careers at CIA and DEA. (Simon-Tr. I 26-7; Baldwin-Tr. I 110; Chavez-Tr. I 175; Davis-Tr. II 60; Murray Service Statement, p. 3; Appellant A, Tr. III 7; Dyckman Service Statement, p. 3). The stress of working long and irregular hours exposed to constant danger is but another aspect of appellants' hazardous service in the line of duty.

Again, to paraphrase Ellis v. United States, 610 F.2d at 764, "the statute granting [law enforcement officers] liberalized retirement eligibility was obviously intended to give special benefits to those in their careers who continually expose themselves to the immediate zone of danger involved in [law enforcement], and [appellants] repeatedly [were] in such danger" at the CIA, as they are at DEA.